IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO.73/2019**

In the matter between:

SIYEMBILI MOTORS SWAZILAND (PTY) LTD **Appellant**

AND

SWAZILAND COMPETITION COMMISSION **Respondent**

Neutral Citation: *Siyembili Motors Swaziland (Pty) Ltd versus Swaziland Competition Commission (73/2019) [2020] [SZSC] 18 (5th June 2020)*

Coram**:** **MCB Maphalala CJ**
Dr. B. J. Odoki JA
J.P. Annandale JA

Date Heard : 7th April 2020
Delivery Date : 10th June 2020

Summary: *Appeal against decision by Competition Commission of Eswatini dismissed by High Court – Ratio that High Court viewed matter before it as a review application, not an appeal. Jurisdiction of High court under the Competition Act limited to Appeals, as per current jurisprudence. Held that Eagles Nest (Pty) Ltd and others v Swaziland Competition Commission wrongly decided – Original jurisdiction to review not ousted by Competition Act – Constitution is Supreme Law and trumps subservient legislation. Appeal to High Court confused with review application – Overemphasis of form over substance. Appeal upheld with costs – Remitted to High Court to hear the appeal, leave granted for Appellant qua Applicant to amend pleadings if so advised.*

JUDGMENT

Jacobus P Annandale JA

[1] The appellant is a well known local motor franchise dealer and sole distributor of new Toyota vehicles and parts in Eswatini, under its trade name of Leites Toyota. In 2017 appellant sold two vacant portions of its immovable property in Mbabane to MA Props (Pty) Ltd, a Property Management Consultancy business and owner of a varied property portfolio.

It also operates as Business Broker, Estate Agent and Employment Agent. Its business objects as listed under its Memorandum of Association excludes any involvement in the motor vehicle trade.

[2] Following registration and transfer of the properties, the Chief Executive Officer of the Swaziland Competition Commission, as it was then known, served letters of "Demand for Notification of a Merger and Acquisition" on both the seller and purchaser. The letter of demand served to inform the appellant that: " *Under Section 35 (1) of the Act, a person who, in the absence of authority from the Commission, whether as principal or agent participate in effecting – (a) a merger between two or more independent enterprises engaged in manufacturing or distributing subsequently similar goods or providing substantially similar services; (b) a takeover of one or more such enterprises by another enterprise, or by a person who controls such an enterprise, commits an offence and shall, on conviction, be liable to fine not exceeding two hundred and fifty thousand (E250 000) Emalangeni or to imprisonment to a term of imprisonment not exceeding 5 years or both"*.

These letters continued to state that:

> "5. *The commission has reason to believe that Siyembili Motors (Pty) Ltd and Maprops (Pty) Ltd have engaged in a transaction or conduct as described in section 35 of the Act, involving the sale/transfer of properties, Portions 1079 and 1080 of Farm 2, both located in the Hhohho district, Swaziland.*
>
> 6. *The commission hereby calls upon Siyembili Motors (Pty) Ltd to submit within 30 days to the commission all and/or any relevant documentation concerning the transaction as envisaged by section 35 of the Act.*
>
> 7. *If no such transaction has been concluded or entered into, you are to submit to the Commission an affidavit declaring that the parties have not entered into any merger or acquisition with the other party, as defined by section 35 of the Act".*

[3] The appellant then instructed its attorneys to respond to the contention by the Commission that a merger has been conducted in respect of the sale of its properties, and that it disputes this. The attorneys also informed the Commission that the property in question is a vacant piece of land upon which there is no production or distribution of any commodity. With reference to the relevant legislation, it was motivated that the sale of the immovable property did not fall under the definition of "the acquisition of a controlling interest in any trade involved in the production or distribution of any goods or services, or an asset which is or may be utilized for or in connection with the production of any commodity ", as a merger is defined under Section 2 of the Competition Act. Also, that the parties do not fall within the definition of Section 35 of the Act as they are not engaged in the distribution or production of substantially similar goods or services. Further issue was taken with the amount of a penalty which the commission could impose, as stated in its letter to the appellant. In compliance with the Commission's demand, an affidavit was endorsed together with the lawyer's letter.

[4] In response, the CEO of the Competition Commission took issue with this denial and insisted that the transaction amounted to a merger and the

acquisition of a controlling interest into the business of the appellant by the purchaser of the land. The appellant was advised of the maximum penalty of E 250 000 and/or five years of imprisonment, further that a merger without authorization of the Commission is null and void. The appellant was given 14 days to notify the transaction.

[5] Dissatisfied with this decision of the Competition Commission that in its determination the transaction is notifiable, the appellant decided to note an appeal in the High Court, as per the dictates of Section 40 of the Competition Act. Its contention was that the decision of the Competition Commission that the transaction was indeed notifiable, being regarded as the acquisition of a controlling interest amounting to a merger, was palpably wrong and not supported by the relevant legislation.

[6] Section 2 of the Competition Act which defines a merger was argued by the appellant to be read in conjunction with Regulation 31 (g) which defines a controlling interest when a holder thereof :

> "(i) Beneficially owns more than one half of the voting and/or more than half of the economic interest of the target firm.

(ii) Is entitled to vote a majority of the votes that may be cast at a General meeting of the firm.

(iii) Is able to appoint or veto the appointment of a majority of the directors of the firm; or

(iv) Has the ability to exercise a decisive influence over the policies of the firm and its strategic direction;"

and also to be read with Section 35 which deals with a merger as follows:

"35 (1) A merger shall not be carried out without the authority of the Commission and a person who, in the absence of authority from the Commission, whether as a principal or agent and whether by himself/herself or his/her agent, participates in effecting-

a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;

b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise."

[7] The appellant wanted the Court below to set aside the decision of the Competition Commission on appeal and to declare that the sale of the vacant land did not meet the legal requirements of when it could be held as either a merger or a notifiable transaction. On appeal, it would then argue the merits of the decision in relation to the statue, in a challenge to the Commission. Section 40 of the Act holds that any person aggrieved by a decision of the Commission under the Act or its Regulations may appeal to the High Court within thirty days after the date on which a notice of that decision has been served. The Act is tacit on the reviewability of such decisions, an aspect I shall soon revert to.

[8] In the process of noting an appeal, a prime example of bad legal draftsmanship manifested itself. It is this bad drafting of the appeal which directly resulted in the High Court issuing an order of dismissal with costs, which in turn is the cause of the appeal to this Court. The further consequence of this flagrant mistake in the drafting of the pleadings in the High Court might as well have had the further consequence of depriving a successful appellant in this Court of its costs in the appeal.

[9] The appellant in the High Court commenced the confusion by its utilization of the long form prescribed for applications, a Notice of Motion supported by an affidavit as to the facts upon which the application relies for relief (see Rule 6 and Form 3 under the High Court Act of 1954 as amended).

[10] The Notice of Motion purports to state in its heading that it is also a "Notice of Appeal in terms of Section 40 of the Competition Act of 2007". It then continues to read that (the respondent) must be pleased to take notice that an application will be made before the High Court for an order in the following terms:

> "1. The decision of the respondent contained in its letter of 25 January 2019 to the effect that the sale of the vacant portions of land prescribed more fully hereunder from the 1st applicant to the 2nd applicant are a notifiable transaction be and is declared incorrect and is hereby set aside.

2. Declaring that the sale of the immovable property described at prayer 1.1 above by the 1st applicant to the 2nd applicant is not a notifiable transaction within the meaning of Section 2 read together with Section 35 and Regulation 3(1) (b) of the Competition Act and Regulations of 2007."

[11] It is this form of a "Hybrid appeal and review", the actual manner in which it has been formulated, which in my respectful view was the root cause of all the confusion which reigned supremely. Now it has ended up in the Supreme Court, following a failed attempt at appeal which was regarded as a Review Court in the High Court.

[12] An appeal to the High Court is legally prescribed in order to raise a challenge to decisions which were made by the Competition Commission, such as is at hand. Equally so, the Act is entirely tacit on the applicability of judicial review. There is no attempt anywhere to exclude the ordinary and wide review jurisdiction of the High Court. Nor could it.

[13] The Constitution of Eswatini very clearly and unequivocally preserves the well-guarded and well established jurisdiction of the High Court in all respects.

Section 151. (1) of the Constitution provides that the High Court shall have:

a) Unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date commencement of this Constitution;
b) Such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland.
c) Such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and
d) Such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.

Section 152 of the Constitution provides that the High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in that exercise of that jurisdiction, issue

orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers."

[14] It does not require mentally challenging intellectual searches, enquiries, analysis, comparatives, application and further ado, to hold that the circumscribed constitutionally retention and explicit spelling it out of what the prevailing position of the review jurisdiction of the High Court was and if there were still any Doubting Thomases around , solace and redemption of the supremacies of our Constitution could well be found in Section 2 of the Supreme Law of Eswatini: "This Constitution is the supreme law of Eswatini and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

[15] I will soon revert to the challenge which was levelled against the ostensible or apparent exclusion of review jurisdiction of the High Court, which was a legal point anchored on legal precedent of a decision by the Supreme Court in the Eagles Nest v Competition Commission which was wholly binding on the lower Court, according to the trite principle of *stare decisis*. The present point is that because of the ambiguity in the papers before the Court,

whether it was an “appeal” as labelled, or a “review”, this could well have been avoided by the presence of appropriate Rules of Court.

[16] These latter aspects must have also confused the drafter of the pleadings, which was not Counsel before us, as much as it subsequently misled the Court. The banner which in bolded print announces itself to be a Notice of Motion, then transforms into a Notice of Appeal in terms of the Competition Act in the very next line.

[17] The first prayer for relief seeks that the Court must declare the decision of the respondent to be incorrect and set it aside. The second prayer seeks a declaratory order to the effect that the decision be diametrically the opposite as was decided by the Commission. Which is which? Was the High Court tasked to hear and determine an appeal proper, or was it tasked to give declaratory relief which in turn has its own unique and separate requirements. Review and Appeal are not the same, but it is also a backdoor approach to seek relief to overturn an administrative decision without a party having been heard on the details and specifics. The material difference between an appeal and review lies in the one being about the merits of a

dispute giving rise to a decision, the correctness of it, while the other concerns itself with the regularity and validity of the proceedings. They interact but remain different.

[18] When the body of the applicant's affidavit is scrutinised, it becomes abundantly clear that the deponent labours under the same frame of mind as that of his lawyer. The language which is used swings to and fro between that of appeal and review. The Notice of Motion (also incorporating a Notice of statutory Appeal) is supported by the affidavit of the appellant's director.

Paragraph 6 commences as follows:

> "This is an application to review correct and set aside a decision…"

[19] This example of textbook language is used countless times in any application on Notice, to correct and set aside a decision or otherwise, on review. A Notice of Appeal would employ contradictory words in its formulation. As an example, I quote from the Notice of Appeal which commenced the proceedings in this Court. In part, it reads that "being

dissatisfied"; "doth hereby appeal… on the grounds…"; "against the whole of the said judgement". Again, a classical application of the tools for the job – the legalese, tried and tested phraseology to be expected in Notices of Appeal.

[20] With any inliking of the imagination, the Applicant who concluded that the Court should "set aside the decision", could not have blamed the Learned Judge of the High Court that it was in fact an application for review which was in up for consideration. Not an appeal, seeking the appeal to be allowed, for stated grounds and reasons.

[21] Advocate Ms. Van der Walt bravely and aptly described the present scenario as "when it looks like a duck, walks like a duck, swims like a duck, it most probably is a duck." If the appeal was dressed up as a review, or even the other way round, it was a determinable issue to decide. And decided *in limine*, it was.

[22] The presiding Judge was understandably persuaded that what he had before him was a review application, despite the label it wore on the front of its

jacket. From what is stated above pertaining to practice and procedure, the absence of appropriate Rules and the confusing manner in which the pleadings were not subjected to careful drafting, the matter is still unresolved to date. It has taken inordinately long, contrary to expeditious determination. Costs must have escalated to high levels.

[23] Once the High Court was persuaded that the matter before it was one of review and not appeal the rest was easy. Fitting like a glove was the decision by the Supreme Court in Eagle's Nest (Pty)Ltd and 5 Others vs Swaziland Competition Commission and Another (1/2014) [2014] SZSC 39 (30 May 2014). The mantra of Eagle's Nest is along the same lines as that of the finding by the Learned Judge in the Court below, that the application for judicial review was precluded by Section 40 of the Competition Act; or that no review was competent where [an] appeal is provided for by Section 40 of the Competition Act.

[24] At the time when Eagle's Nest was decided, the Supreme Court per their Learned Lords Justices Dr Twum JA with Ramodibedi CJ and Moore JA concurring, made a deep and thorough incisive enquiry into the reviewability

or otherwise of a decision by the Competition Commission by the High Court, whereas the enabling statute of the Commission establishes an appeal procedure to the High Court. As already remarked above, the same Act does not oust or proscribe or in any manner seek to exclude or limit the inherent jurisdiction on review of the High Court of Eswatini. That much is also under the sanctuary of our Constitution, as quoted above.

[25] The Learned Court was very extensive. The number of judgments and authorities which were referred to in the voluminous judgement are legio. I do not seek to detract from such illustrious predecessors of this very same Court. Of course, each case needs to be decided on its own merits, but it is the ultimate and universal conclusion which is of concern. It was held that an appeal to the High Court was the one and only mode of seeking relief as stated in the Act. Not review as well.

[26] If the inherent jurisdiction of the High Court to take matters on review has now to be tethered in, so much so that it has now been ostensibly deprived of jurisdiction to review, simply because the Act which establishes a specific Institution has also established an appeal procedure. The old rule of

interpretation, in its original appellation of: *inclusio unus, exclusio alterius*, has accordingly found its way home. Thus, by inclusion of the one, the other is dissolved or so did it subsequently transpire.

[27] In the appeal under consideration, the aggrieved party approached the High Court for redress, but it did not unambiguously litigate on the back of the statutorily available appeal procedure. Instead, even though he might have meant to do so, he was rather unceremoniously held to be an Applicant on Review, not an Appellant on Appeal.

[28] As said, once it was found that the High Court regarded the matter as a review, it was bound by the doctrine of *stare decisis* to retain and follow the judgment of Eagle's Nest, which was binding upon it. Yet again, it was therefore concluded that whereas the Competition Act only refers to an appeal procedure, and not also to anything about judicial review, it meant that the one and only path to seek judicial recourse an aggrievement with the Commission was to appeal at the High Court. Review has been stated to not be a viable option.

[29] However, the jurisdictional and inherent power of the High Court to review matters as are routinely brought before it, has not otherwise been fettered. It remains as it has always been, or at least until Eagle's Nest. It bears no contradiction that the Constitution is Supreme. It cannot be trumped, and certainly not by the Competition Act, and neither does the Act seek to do so at all. The Act does establish an appeal procedure, which could well be followed by anyone advised to do so.

[30] The existing and inherent power of review jurisdiction has not changed. Nor has any attempt to remove it been made in the Act. Unfortunately, the *dictae* in the decision of Eagle's Nest insofar as it refers to an ostensible exclusion of review jurisdiction of the High Court in matters arising from the Competition Commission, cannot be sustained. This Court is enjoined by our Constitution not to depart from any of our previous decisions, insofar as it is necessary, only if we are convinced that it was wrong. I do indeed have to come to this unavoidable conclusion in this appeal.

[31] The appeal is against a finding of the High Court that it did not have jurisdiction to review a decision by the Competition Commission because it

was bound to find, in accordance with Eagle's Nest, that as the Act prescribed only an appeal, only an appeal it must be. Now, because the Court had found itself to be dealing with a review, Eagle's Nest had to be followed and it dismissed the application there and then.

[32] It must therefore follow that this Court departs from its previous decision in Eagle's Nest, now to order that the High Court is not constrained by law as it was held before, and that indeed it has full jurisdiction in the power of review, as well as its other powers, as it always has had, especially under the shield of the Constitution of Eswatini.

[33] In the event, it is ordered that:

1) The Appeal is upheld.
2) The matter is referred back to the High Court for hearing.
3) Leave is granted to amend any pleadings as may be necessary.
4) Costs are ordered to be costs in the cause before the Court below.

JACOBUS P. ANNANDALE

JUSTICE OF APPEAL

I agree

MCB MAPHALALA CJ

I agree

DR. B. J. ODOKI JA

Counsel for the Appellant: Adv. M Van der Walt, Instructed by Henwood & Associates.

Counsel for the Respondent: Mr. SM Simelane of Simelane-Mtshali Attorneys.